In

By

Supreme Court of the United S

OCTOBER TERM, 19

Filed October 15, 1900

No. 22

CHESAPEAKE & OHIO RAILWAY
COMPANY

vs.

LUCY DIXON, Administratrix, &c.,
R. M. CHALKLEY and WILLIAM [illegible]

Brief for Plaintiff in Error

C. B. SIMRALL,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1899.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Plaintiff in Error,

No. 273. *vs.*

LUCY DIXON, Administratrix of Alexander Dixon, deceased; R. H. CHALKEY and WILLIAM SIDLES,
Defendants in Error.

Brief for Plaintiff in Error.

STATEMENT OF THE FACTS OF THE CASE.

On the 22d day of September, 1894, Alexander Dixon, while a resident of and domiciled in Boyd county, Kentucky, was run over and killed by a train of the Chesapeake & Ohio Railway Company, plaintiff in error, at what is known as Pollard's Branch Crossing in the city of Catlettsburg, Boyd county, Kentucky.

On the 29th day of September thereafter, his widow, Lucy Dixon, was, by proper orders of the Boyd County Court, appointed administratrix of his estate and duly qualified as such; and afterwards, on the 19th day of October, 1894, she filed in the Clerk's office of the Boyd Circuit Court her petition in words and figures as follows, to-wit:

"The plaintiff, Lucy Dixon, says that Alexander Dixon departed this life intestate on the 22d day of September,

1894, while a resident of and domiciled in Boyd county, Kentucky; that by an order of the Boyd County Court, made and entered on the ——— day of September, 1894, plaintiff was appointed administratrix of his estate, and gave bond and duly qualified and is now acting as the administratrix of the said estate. A copy of said order is filed herewith as part hereof, marked 'A.'

"She says that the defendant, the Chesapeake & Ohio Railway Company, is, and at the time hereinafter stated, was a corporation and common carrier of freight and passengers for hire, and said defendant—locomotives, cars and other appurtenances now operates, and at the times hereinafter stated, operated lines of railway extending into the county of Boyd and state of Kentucky. She says that on the 22d day of September, 1894, while crossing the track of the defendant at the crossing of the Ashland & Catlettsburg Turnpike Road, and within the corporate limits of said town, the said intestate, Alexander Dixon, was, by the negligence of the defendant, the Chesapeake & Ohio Railway Company, and of its agents and servants, R. H. Chalkey and William Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains while on its way from Ashland to Catlettsburg, Boyd county, Kentucky, whereby she has been damaged in the sum of thirty thousand dollars.

"At the time and place when and where plaintiff's intestate was injured, as aforesaid, the defendants, R. H. Chalkey and William Sidles, were, and a long time theretofore had been, servants of the corporate defendants, in charge and control of said train, and then and there were, and long time heretofore had continuously been, respectively engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants.

"Wherefore plaintiff prays for a judgment against the defendants—$30,000, for her costs and all proper relief.

"Scott & Dinkle,
"John F. Hager,
"*Attorneys for Plaintiff.*"

And afterwards, upon the 30th day of January, 1895, before answer to said petition was due, the plaintiff in error,

Chesapeake & Ohio Railway Company, filed in said Boyd Circuit Court its petition and bond for removal of the cause to the United States Circuit Court for the District of Kentucky, in words and figures as follows, to-wit:

"PETITION FOR REMOVAL OF THIS CAUSE TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

"Boyd Circuit Court. Lucy Dixon, administratrix of Alexander Dixon, plaintiff, vs Chesapeake & Ohio Railway Company et al, defendants.

"*To the Honorable the Circuit Court of Boyd County, State of Kentucky:*

"The petitioner, Chesapeake & Ohio Ry. Co., respectfully shows that it is one of the defendants in the above entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and costs, exceeds the sum or value of $2,000.

"Your petitioner further shows that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your said petitioner, the Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized and existing under and by virtue of the laws of the state of Virginia and a citizen of the said state of Virginia, and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, as your petitioner avers, was then and still is a citizen of the state of Kentucky; that the said controvery is of the following nature, viz:

"Whether your petitioner is liable to the said plaintiff for damages on account of the death of the said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed by said plaintiff that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy.

"Your petitioner further states that the defendants R. H. Chalkey and William Sidles, are neither necessary nor proper

parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the Circuit Court of the United States for the District of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States.

"And your petitioner offers herewith a bond, with good and sufficient security, for its entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto, and it prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept said surety and bond, to cause the record herein to be removed into said Circuit Court of the United States for the District of Kentucky; and we will ever pray.

"WADSWORTH & COCHRAN,
"*Attorneys for Petitioner.*

"STATE OF KENTUCKY, } Sct.
"County of Boyd, }

"I, W. H. Wadsworth, being duly sworn, do say that I am a member of the firm of Wadsworth & Cochran, the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof; that the statements and allegations therein contained are true as I verily believe.

"W. H. WADSWORTH.

"Subscribed by the said W. H. Wadsworth, in my presence, and by him sworn to before me this 30th day of January, A. D. 1895.

"M. F. HAMPTON,
"*D. C., Boyd Circuit Court.*"

"Lucy Dixon, administratrix of Alexander Dixon, plaintiff, v. Chesapeake & Ohio Railway Company et al, defendants. (Bond.)

"Know all men by these presents that we, the Chesapeake & Ohio Railway Company, as principal, and W. H. Wadsworth and A. M. J. Cochran, as sureties, are hereby

held and firmly bound unto Lucy Dixon, administratrix of Alexander Dixon, in the penal sum of one thousand dollars; for the payment thereof, well and truly to be made unto the said Lucy Dixon, administratrix of Alexander Dixon, her heirs and assigns, we bind ourselves, jointly and severally, firmly by these presents.

"Yet, upon these conditions: The said Chesapeake & Ohio Railway Company having petitioned the Circuit Court of Boyd County, State of Kentucky, for the removal of a certain cause therein pending, wherein Lucy Dixon, administratrix of Alexander Dixon, is plaintiff, and the Chesapeake & Ohio Railway Company is defendant—the Circuit Court of the United States in and for the District of Kentucky.

"Now, if the said Chesapeake & Ohio Railway Company, your petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all cost that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

"Witness our hands and seals this 29th day of January, A. D. 1895.

"THE CHESAPEAKE & OHIO RAILWAY CO.,

" [SEAL] By A. M. J. COCHRAN.
" [SEAL] W. H. WADSWORTH.
" [SEAL] A. M. J. COCHRAN.

"STATE OF KENTUCKY, } Sct.
"Mason County, }

"We, W. H. Wadsworth and A. M. J. Cochran, both of Mason county, in said state, the sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, that we are residents of the state of Kentucky and property holders therein, and that we are each of us worth the sum of one thousand dollars, over and above all our debts and liabilities and exclusive of property by law exempt from execution, and that each have property in the state of Kentucky liable to execution and of the value of more than one thousand dollars.

"W. H. WADSWORTH.
"A. M. J. COCHRAN.

"Subscribed in my presence by W. H. Wadsworth and A.

M. J. Cochran and by them sworn to before me this 29th day of January, A. D. 1895.

"WM. D. COCHRAN,
"*Clerk Mason County Court.*"

And afterwards, at another day, the said Boyd Circuit Court entered up the following order:

"Lucy Dixon, administratrix, plaintiff, against C. & O. Railway Co., defendant. Ordinary.

"This cause coming up on the motion of the defendant for a removal of this cause to the United States Court for the District of Kentucky, upon its petition and bond already presented, and the Court being sufficiently advised, adjudges that the bond filed be approved; but the Court, having fully considered the same, overruled the petition and motion of the defendant for a removal of this cause to the United States Court for the District of Kentucky; and to this ruling and opinion of the Court the defendant excepts."

The Boyd Circuit Court thereafter proceeded with the trial of the cause, and the jury having upon the 12th day of October, 1895, found a verdict for the plaintiff (defendant in error) in the sum of $10,000.00, judgment for that sum was entered; and plaintiff in error having upon the same day filed its motion and grounds for a new trial, the same was overruled and appeal to the Court of Appeals of Kentucky was taken and prosecuted, and upon the 28th day of October, 1898, the judgment of the Boyd Circuit Court was affirmed in an opinion by Chief Justice Lewis (see Record, pages 17 to 20 inclusive). And afterwards, on the 2d day of January, 1899, plaintiff in error filed petition to move the Court for a rehearing (see Record, page 22). And afterwards, on the 23d day of March, 1899, the petition for rehearing was overruled, Justice Paynter, Durelle and Burnam dissenting. Whereupon writ of error was taken to this Court, and on March 24, 1899, the following assignment of errors was filed in this Court:

"ASSIGNMENT OF ERRORS.

"Chesapeake & Ohio Railway Company, plaintiff in error, v. Lucy Dixon, administratrix of Alexander Dixon, defendant in error.

"The Chesapeake & Ohio Railway Company, plaintiff in error in the above entitled cause, complains of the judgment rendered herein by the Court of Appeals of Kentucky, and for error therein, assigns the following:

"I.

"The Court erred in affirming the judgment of the Boyd Circuit Court, whereas it should have reversed the same, with directions not to proceed in the said cause.

"II.

"The Court erred in holding in substance and effect that the Chesapeake & Ohio Railway Company had no right, under the Constitution and laws of the United States, to remove the cause pending in the Boyd Circuit Court against it to the Circuit Court of the United States for the District of Kentucky, and that the said Chesapeake & Ohio Railway Company had no right, under the Constitution and laws of the United States, to have the said cause removed as aforesaid.

"III.

"The Court erred in holding that the Boyd Circuit Court had any right to proceed any further in the said cause after the petition to remove the same on behalf of the Chesapeake & Ohio Railway Company had been filed in the said Boyd Circuit Court.

"IV.

"The Court erred in holding that the proceedings in the Boyd Circuit Court, after the filing of the petition of the Chesapeake & Ohio Railway Company therein for the removal of the said cause to the Circuit Court of the United States, were not void and of no force and effect as against the said Chesapeake & Ohio Railway Company.

"Wherefore the said Chesapeake & Ohio Railway Company prays that the said judgment of the Court of Appeals of Kentucky be reversed, with directions to take such order in the premises as will result in the nullification of the judgment against it and the removal of the said cause from the Boyd Circuit Court.

"WADSWORTH & COCHRAN,
"*Attorneys for Plaintiff in Error, the Chesapeake & Ohio Ry. Co.*"

ARGUMENT.

The cause of action against the Railroad Company, plaintiff in error, and its co-defendants, Chalkey and Sidles, its employes, is not a joint tort, and the controversy as to plaintiff in error is separable from that as to the employes. The master is liable severally only and not jointly with the servants.

The liability of the master must be founded upon one of two rules.

1. A legal liability which grows out of that public policy which makes the master responsible for the acts of servants done within the scope of business for which they are employed; a rule commonly referred to as *respondeat superior*.

2. A joint responsibility by being present by some representative or superintending officer, or by commanding or directing the act to be done.

In the one case the master must respond, not because it participated in the wrong or was a co-actor in the trespass, a joint trespasser, but because there has been evolved out of the original doctrine of responsibility in case of a tort, which was at first a spirit of revenge, a milder and more benificent responsibility demanded by reasons of public policy, "that such wrongful acts as by ordinary human laws are likely to happen in the course of the service, are imputable to the service."

At first the master was bound to surrender the negligent servant; then, as to negligent acts of the servant, performed with the knowledge of the master, there grew up a personal liability of the master; the noxal action gave way to an action to enforce general personal liability. Then as to certain public personages, such as innkeepers and shipowners, there arose a liability for acts of servants done within their knowledge, likely based upon exceptional confidence reposed in such personages. Perhaps a better reason was that as the master could surrender the servant and

had the alternative to do it or pay, his liability became fixed as to payment in that manner. Another reason was that the master should respond for employing the services of a bad servant. The generality of the reason expanded the principle and the responsibility of the master soon developed as to acts of freemen servants as well as slaves. The Twelve Tables gave way to the Aquilian law, which law itself yielded in turn to interpretation. And from the bare permission to ransom one's negligent slave, has grown up a universal doctrine of responsibility of the master for acts in which there was no part and for which, in no sense, was the master to blame. The Roman rule made to meet an isolated case, has grown into "a universal and unlimited responsibility." Indeed, it has grown to be "an exigency of the social order."

The Teutonic side of this strange parentage of our common law is in line with the Roman rule. But nowhere do we derive the idea that the master being absent is held responsible for the servant's negligent acts upon the theory that he acted in concert with the servant. It is the public policy of the same old rule, which in olden days found a necessity for substantial responsibilty, and for that reason placed upon the master the burden of the servant's acts while about his business. Not because the master must select fit servants, for the master might justify by proving he had done this, but, as put by Mr. Pollock, "I am answerable for the wrongs of my servant or agent, not because he is authorized by me, or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others." Pollock on Torts, page 70 (4th Ed.)

In the other case, the master responds for direct trespass done in concert with the servant either by positive direction or by being present, by some one in representative capacity, participating in the act; in other words, by being a co-actor in it.

There can be no contention that it is sought in this proceeding to hold the master liable upon this second ground, for the petition alleges that the "intestate, Alexander Dixon, was, by the negligence of the defendant, the Chesapeake & Ohio Railway Company and its agents and servants, R. H. Chalkley and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains," and "said negligence of the corporate defendant was done by and through its said servants." Neither is there any contention that the master being absent gave any orders or directions to the servants with reference to the alleged negligent act of running the train over the decedent.

Neither is the question presented one of misjoinder; it need not be considered whether there is a misjoinder in this case, or whether if there is, for that reason the case might be removed by the corporate defendant. This is settled by a number of cases and recently by Judge Shiras in the case of *Deere, Wells & Co.* v. *Chicago, M. & St. P. Ry. Co.* He says:

"The question whether these two controversies—one against the co-employe for his personal negligence, and one against the railway company on the liability of the master for the negligence of its servant—could be properly joined in one suit would seem to be a matter wholly aside from the question of the right of removal. If, upon the face of the petition, it appears that the plaintiff has joined therein two controversies, separate and distinct, and that one of them is between citizens of different states, and involves the requisite amount, then the right of removal is shown to exist, no matter whether the two actions could be properly joined in one suit or not." (See 85th Fed. Rep., page 888).

The allegations of the petition necessarily present to us the simple proposition:

Is a cause of action against the master for the negligent acts of the servants, done in its absence and without its order or direction,

a separable controversy from a cause of action against the servants for the same act of negligence directly brought about by the servants?

We have endeavored to show by tracing it from its source that the principal upon which the master is held liable in cases of negligent acts of the servant in its absence, does not grow out of any idea of concert of action at all, and we may add, as pointed out by Judge Taft in the leading case of *Warax* v. *C., N. O. & P. Ry. Co.*—

"The rule which permitted a plaintiff injured by the joint act of defendants to join them in one action was rested originally on the theory that they were to be held as conspirators, and that each, having knowingly embarked on the unlawful venture, was liable for all that the other did, and that therefore they could be held as partners in wrong. Joint trespassers were held on the same principle and finally, where two persons were guilty at the same time of mere acts of negligence, operating together to cause injury to a third person, it was held that they must be regarded as acting in concert, and that each must be held liable for the entire damage, as for a joint tort The advantage which this gave the defendant in actual trials was very considerable. Under the old rule, which forbade parties to testify, it prevented one defendant from using the other as a witness. It enabled the plaintiff to take a joint judgment against both, and to enforce it against either. The election which the plaintiff had to sue one or more of the joint feasors grew out of the assumed concert of action which he charged against them all. Hence, the question is whether, when a master is held liable for the negligence of his servant in his absence, which negligence he did not direct, he can be said to have acted in concert with the servant to produce the injury in such a way as that he and the servant can be held liable in the joint action. Clearly not. His liability does not arise from any common purpose that he had with the servant, or from any actual unity of action between them, in point of time and effect, or otherwise. His liability arises simply and solely from the policy of the law, which makes him responsible for the acts of his servant, done in the discharge of his business." (See 72 Fed. Rep., 642.)

It follows, we think, that there can be no action of trespass *vi et armis* against the master for the negligent act of the servant in its absence, and logically and necessarily the action must be trespass on the case.

The liability, however, of the servant is that of a tort feasor as and for his direct trespass, and the action is trespass *vi et armis*. The two causes of action, moreover, are governed not only by different principles of law, but are controlled as between the parties defendant by entirely distinct rules in the respective cases.

In trespass on the case, the master having responded as master for the tortious act of the servant done in its absence, may recover of the negligent servant the amount of the recovery against it, while on the other hand, in the case of an action of trespass *vi et armis*, where the master is joined with the servant in a proceeding against it as being in concert with him as a co-actor or joint tort feasor, there could be no contribution as between the master and servant, and the master can not recover of the servant, or *vice versa*, the amount of the recovery adjudged against them jointly, or either one of them.

Moreover, there is a question of joinder that does arise in this and similar cases which does not relate to the joinder of two causes of action in one proceeding, but does relate to the joinder of master and servant in one cause of action. The cases which hold that the master and servant may be sued together in one cause of action, or, in other words, which hold that the liability is joint and for the same reason as to both defendants, are based upon certain language of Judge Cowen in *Wright* v. *Wilcox*, 19 Wend., 343, which appears to be the leading case for the view that the liability is joint and that the master and servant "are both guilty of the same negligence at the same time and under the same circumstances—the servant in fact, and the master constructively, by the servant, his agent."

This is in effect an attempted extension of a fiction peculiarly adapted and applied to the doctrine of principal and agent in cases of contract, etc., to cases of trespass, a transposition of the master into the shoes of the servant by a fiction of substitution. The opinion in the case cited quotes the rule laid down by Hammond that the question is "whether the principal and inferior may be charged jointly depends on whether the inferior is liable as a trespasser *vi et armis*, or in case only. If the latter, they may be sued together, but otherwise if the former; it being held, how justly may be questioned. that a principal is liable for his agent's misconduct only in case."

And this rule the Judge approves in the main, but suggests that it seems to be shaken by the case of *Moreton* v. *Hardern*, 6 Dowl. & R., 275. And this suggestion has been the text for every case from that day to this, all of which blindly follow *Wright* v. *Wilcox*.

Judge Taft, following Judge Metcalfe, in *Parsons* v. *Winchell*, 5 Cush., 592, we think effectually disposes of the suggestion of Judge Cowen in the following language:

"The English case of *Moreton* v. *Hardern*, above cited, is not at all in conflict with the view taken of the cases in Massachusetts, and other cases cited above, in which it is held that a master is not jointly liable with the servant for mere negligence. In that case the three owners of the coach were held liable jointly for the act of one of them. In that case the three were all principals, and were responsible for the act of the one who was the servant. The fact, therefore, that they were jointly sued, and the suit was maintained, did not at all establish the principal that, if the one through whom the injury had been inflicted was not a principal with the other two, a suit against the three could have been sustained. This distinction is pointed out by Judge Metcalfe in *Parsons* v. *Winchell*, *supra*." *Warax* v. *Railway Co.*, *supra*.

In the case of *Moreton* v. *Hardern*, the plaintiff had his election or could have proceeded against the driver in tres-

pass for the direct act as driver without regard to any allegations of ownership whatever; or he could have proceeded against him in case as principal and owner for his responsibility as master for his acts as driver. The question then does depend upon whether the servant, as servant alone, may be sued in case, if not, then the causes of action are different and the controversies are separable.

A few courts in this country have followed *Wright* v. *Wilcox*, but the great weight of authority is opposed to the *dicta* of that case. This leading case of *Wright* v. *Wilcox*, decided in 1838, was based on the following facts:

"The plaintiff's minor son was run over by a wagon driven by S. Wilcox, son of J. Wilcox. The son driving the wagon was in the employment of his father. The lad who was hurt asked leave to ride in the wagon, which was granted. The boy attempted to get on the wagon, taking hold of the side between the hind and front wheels. S. Wilcox did not stop his team, though warned by a bystander that if he did not the lad would be killed. Looking around and seeing other boys, as well as plaintiff's, trying to get on the wagon, he whipped his horses from a walk into a trot. The plaintiff's son fell off and was seriously injured by one of the hind wheels. This was a joint action against Wilcox and his son. Motion for non-suit was denied."

The action was against father and son and was trespass on the case. A new trial was granted upon the ground that the master was not responsible for the wilful act of the servant, and what Judge Cowen said as to the former action was not necessary for the disposition of the case and was mere *obiter dicta*. Nevertheless, it has been followed by quite a number of cases. Judge Cowen, however, in the course of the discussion of the real question upon which the case was determined and new trial granted, quoting from Reeves on Domestic Relations, 357, gives an insight into his reasons for the responsibiliiy of the master when he says:

"Why is the master chargeable for the act of his servant? Because, what a man does by another, he does by himself."

Here we find, we think, the true difficulty with the *obiter* in *Wright* v. *Wilcox*, and the cases which follow it. We shall see that the very next case in New York (1850) adhered to *Wright* v. *Wilcox* upon this ground. That was the case of

Suydam v. *Moore et al*, 8 Barb., 858.

This was a cow case and the action was brought against the engineer, Moore, and the fireman, Losee, for running over the plaintiff's cow, and Willard, Justice, citing *Wright* v. *Wilcox* and Reeves, says:

"The master is liable for the acts of the servant while acting within the scope of his authority, upon the principle that what a man does by another, he does by himself."

But this action turned upon a statute of New York making all railroad companies, and also all railroad employes, liable for killing stock where the railroad company had not built fences and cattle guards, and the inquiry of the Court as to the liability of the master was not at all necessary for the disposition of the case, as the statute itself made the employes liable, and the master was not sued.

The next case (1854) was the case of

Montfort v. *Hughes et al*, 3 Ed. Smith, 591.

Sarah Montfort brought a suit in the Marine Court against the servant, Wild, and Hughes et al, his masters, for driving the horses belonging to Hughes and the other master over the plaintiff. Defendants did not appear on the first day of the trial, and one of the witnesses had been introduced, but on the last day the defendants did appear and pleaded to the merits and on motion. Wild, the servant, was stricken from the record as a party and used as a witness, on the idea that the servant and the masters were improperly joined. The Appellate Court, in an opinion by Woodruff, Justice, held (1) that the motion to strike Wild from the record was too late. This should have dis-

posed of the case, but the Court went on, and quoting *Wright* v. *Wilcox*, said: "And it is moreover held that in a case like the present there was no misjoinder," and likening the case under discussion to the case of *Michael* v. *Alextree*, 2 Levinz, 172.

The difficulty here is, the case of *Montfort* v. *Hughes* was not the case of *Michael* v. *Alextree*. In the latter case, although the master was absent, the joinder was held to be good, because the Court said "it shall be intended the master sent the servant to train the horses there;" and in Keble's Rep., 3 Keble, 650, it is stated that the Court said "it is at the peril of the owner to take strength enough to watch them" (the horses) "and the master is as liable as the servant, if he gave him order for it; and the action is general for bringing them thither." And, as pointed out by Judge Metcalfe in *Parsons* v. *Winchell*, the principle decision in that case was "that the master, though absent, had ordered the servant to train intractable horses in a place constantly thronged with persons, and was, therefore, in legal intendment, guilty of the act of training them there, jointly with his servant."

Justice Woodruff also cites the case of *Moreton* v. *Hardern*, *supra*, which we have heretofore seen is not in point.

This case was followed by a case in 1864—

Phelps v. *Wait*, 30 N. Y., 78.

In this case the plaintiff was crossing a street. The defendant, Nathan Wait, was driving a team and wagon, the property of his father, William Wait, in whose employment he was and who was absent. Nathan Wait, while in an altercation with a drunken man, suddenly and rapidly drove the team out of the yard and ran over plaintiff, who sued both father and son. The case presented three questions, two of which were practically conceded and scarcely referred to. The third contention was as to the right to

join master and servant, and Justice Hogeboom, citing *Wright* v. *Wilcox*, disposed of that question by the following astonishing remarks:

"The case was retained for examination principally upon the other point—the supposed misjoinder of parties—and to enable the defendants' counsel to supply a reference to authorities showing that in analogous cases principal and agent could not be sued together. The current of authority is certainly the other way, and in favor of the right to join these parties. *And I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine.*"

The next New York case (1870) was

Priest v. *Hudson R. R. Co.*

This was an action for assault and battery. The defendant's brakeman, who was not joined, violently ejected the plaintiff from the train, the plaintiff having no time to procure a ticket, and the question in the case was, did the statute of limitations of two years in cases of assault and battery, apply? The Court, by Justice Monell, held it did, and that the action against the railroad company was for assault and battery. It seems, by a provision of the code of New York, all forms of action had been abolished and reduced into one form, "civil action," and there was no longer any action so called, of assault and battery, or trespass, or tresspass on the case, but simply a civil action which embraced them all. But the Court citing *Wright* v. *Wilcox*, says:

"Under the old form of actions, I can not doubt this would have been trespass, assault and battery, and not trespass on the case."

And again,

"The liability of defendants proceeds upon the principle of agency."

And again, referring to the distinction between trespass

and trespass on the case and cases upholding a different view, he says:

"In this country, however, and particularly in our state, this rigid strictne s was greatly relaxed before the code, and trespass and case were mostly concurrent remedies. Assuming then, as the plaintiff must assume, that the liability of the defendants arises from the act having been done by their servant in the course of his employment, and not negligently or unskillfully, then it follows that it was a joint trespass for which a joint or several actions against either could be sustained, but the action would be for the same cause, *for what a master does by his servant, he does by himself.*"

Still following the principle enunciated in *Wright* v. *Wilcox*; but it appears that this was not necessary for the decision of this case because the code had abolished the action of assault and battery by that name, and all actions were reduced to civil actions.

We have found three other states of the Union in which the New York cases have been followed.

The first, in 1874, is the case of

Newman v. *Fowler*, 37 N. J. Law, 89.

In this case plaintiff had employed the defendant, Fowler, as an architect to oversee the putting up of a building, which building, by the verdict, was held to be defective in workmanship and materials in consequence of the want of care of the contractor and architect. The suit was solely against the architect, and Beasley, Chief Justice, in disposing of the case, said:

"Whenever the damage is the product of the contributory misfeasance, the action will lie against each wrongdoer, and the person thus sued will be held for the entire detriment. It is a familiar rule of practice that all or any of joint trespassers may be prosecuted, and that such as are thus sued, must answer for all the consequences of the wrong done. Nor can they claim contribution, the one from the other, so as to dispense the loss equally among themselves, the reason being that the law will not undertake to adjudge the burthens of misconduct."

There is no case of master and servant presented here. It is a case of joint tort feasors pure and simple. Both guilty of misfeasance and both responsible directly as tort feasors. There is no doctrine of *respondeat superior*, because the Court is talking about contribution as between joint tort feasors and not contribution as between master and servant. It certainly could not be contended that as between the master, responsible on the doctrine of *respondeat superior*, and the servant, there could be no contribution.

The next case (1876) is that of

Wright et al v. *Compton*, 53 Ind., 337.

This was a blasting case. The plaintiff, Compton, sued Wright, the owner of the quarry, and King et al, employes, for blasting along the public highway upon which he was traveling and for injuries received therefrom. Biddle, Justice, held as follows:

"The general rule is that a master is responsible for injuries to others resulting from the carelessness or negligence of his servants while in the performance of the master's business."

In which he says he follows *Evansville R. R. Co.* v. *Baum*, 26 Ind., 70, which case, while conceding that trespass will not lie against the master for the act of the servant, strangely enough treats that as a purely technical objection. There seems to be no real difference between these cases and the case of *Michael* v. *Alextree* in principle. It would seem that the master who orders and directs blasting along a public highway is in the same attitude as the master who directs the driving of unruly and dangerous horses in a public highway.

The next case (1895) is from the Supreme Court of Wisconsin, and is

Greenberg v. *Whitcomb Lumber Co. et al*, 63 N. W. Rep., 93.

The plaintiff sued the Lumber Company and Parlan Semple, its managing agent, for injuries received from operating a defective wood machine, and the Court held that there was but a single cause of action. The petition charged that both the defendants knew that the machine was defective and dangerous and that it was defectively and insecurely fastened to its shaft. The plaintiff was an employe. The duty of the defendant company was to furnish him safe and proper machinery to work with, and the failure upon its part to do this made the company directly responsible to the plaintiff if injured on that account. The allegations of the petition make this apply equally to the superintendent, and charges this duty upon both defendants, and he, if proven, should recover as and for a direct tort in that respect, and if the recovery was on that ground there could be no contribution between the company and the superintendent to dispense the amount of the recovery because they were both direct tort feasors; and no reason appears from the facts of this case for citing *Wright* v. *Wilcox* as authority for sustaining a suit in which two joint tort feasors had been joined. Newman, Justice, says in that opinion:

"The complaint states but a single cause of action. It is the same cause of action against both defendants arising from the same acts of negligence."

Thus far the Court presents the true condition of things, but he continues:

"The master for the negligence of its servants; the servant for his own misfeasance. Both master and servant being liable for the same acts of negligence may be joined as defendants."

The facts of the case show that the master was not held on any idea of responsibility for the acts of the servant, but for its own act in not furnishing proper machinery for its employe to work with, while the servant was held upon the

same identical ground, coupled with his further direct act of putting the man to work with such a machine, which was misfeasance.

We claim that these cases rest upon a misconception of the maxim, "*Qui facit per alium facit per se*," which maxim stretches the rule which substitutes the master in the place of the servant for authorized or ratified acts into a fiction which attributes the direct act of the servant to the master as his direct act. We have already cited the criticism of Mr. Pollock upon this interpretation of the maxim. A very early case reached the same conclusion although by, maybe, a different process of reasoning.

In *Sharrod* v. *London, etc., R. R. Co.*, the Court said:

"The maxim, '*Qui facit per alium facit per se*,' renders the master liable for all the negligent acts of the servant in the coarse of his employment, but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him, case will * * * unless the act was done by his command; that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of." 4 Exch., 580.

The leading case in America in support of the position that master can not be joined in the same cause of action with the servant for the negligent act of the servant done in the master's absence and without his order, is the case (1850) of

Parsons v. *Winchell et al*, 5 Cush., 592.

This case is from the Supreme Court of Massachusetts. It was an action on the case of Parsons against Powers, the servant and his master, Winchell, who owned the wagon, and Luddington, the owner of the horses drawing the same.

The complaint was that Powers negligently drove the said wagon and horses against the horse and wagon of plaintiff and injured same, Winchell not being present.

The Court below held that Winchell could be joined with Powers if the injury was occasioned by the negligence of Powers, and he was at the time in the service of Winchell.

The Supreme Court, in reversing the lower court (Metcalf, J.), said:

"The question to be decided is, whether this action on the case, brought against the owners of horses and a carriage, and their servant, the driver, jointly, can be maintained for an injury done by the negligent driving of the servant, in the absence of the owners. And we are of the opinion that it can not.

"To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. In trespass, all are principals, and he who commands a trespass, to be committed, though absent when it is committed, is regarded as a trespasser, and may be sued alone, or jointly with him who obeyed his command. And it has been decided, where one of several proprietors of a coach and horses acted as driver in the absence of the others, and injured a third party, by negligent driving, that he and the other proprietors were jointly liable to such party, in an action on the case. *Moreton* v. *Hardern*, 6 Dowl. & Ryl., 275, and 4 Barn. & Cres., 223. They were all held to be responsible for the conduct of the person whom they suffered to drive, whether he was one of themselves or their servant. But the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases, he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. He is liable, says Lord Kenyon, 'to make a compensation for the damage consequential from his employment of an unskillful or negligent servant.' 1 East., 108. The servant also is answerable to the party injured by his acts done as servant, and is answerable to the master for any damages which the master may be compelled to pay for his wrongful acts, unless those acts were directed by the master. But if the master and servant were jointly liable to an action like this, the judgment and execution would be against them jointly, as joint wrongdoers, and the master, if he alone

should satisfy the execution, could not call on the servant for reimbursement, nor even for contribution. *Merryweather* v. *Nixan*, 8 T. R., 186; *Vose* v. *Grant*, 15 Mass., 505, 521.

"It is said, in Hammond on Parties, 77, that where a Sheriff's bailiff, or a carrier's servant, is liable for causing a breach of duty, he can not be charged jointly with his superior, since the grounds of their liability are different. And it was decided, in *Campbell* v. *Phelps*, 1 Pick., 62, that a Sheriff and his deputy could not be joined in an action for the act of the deputy alone, though both were severally liable for the act. That case, as it seems to us, is not distinguishable from the case at bar. And we find no decision to the contrary, though it was said by Cowen, J., in *Wright* v. *Wilcox*, 19 Wend., 343, that he saw no reason why a joint action, like the present, would not lie.

"In 1 Walford on Parties, 564, 565, it is said that 'the only instance' in which a principal is chargeable for the acts of an inferior, so as to afford a joint right of action against both, is that of a Sheriff who is chargeable jointly with his under-officer, when the latter commits a tort under color of executing legal process. See, also, Broom on Parties, 273, 274."

This was approved in 1862 by the case of

Hewett v. *Swift et al*, 4 Allen, 420,

and in 1877 by the case of

James Mulchey v. *Methodist Reg. Soc. et al*, 125 Mass., 487.

In this case, Gray, C. J., says:

"But the jury should have been instructed as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intendment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and therefore liable jointly."

Massachusetts is followed by many other states.

In Ohio the leading case is

Clark v. *Fry*, 8 Ohio St., 358,

which was an action against Clark, the owner, for making an excavation in front of his premises in the street, and for the act of his servant in negligently leaving it in an unfenced condition, by reason of which Fry was injured. The Court said:

"But whether the liability to the defendant in error, if any existed, attached to Freeman alone or to Clark for the negligence of his servant or agent, or to Clark and Freeman as joint tort feasors, depended upon a legal question arising upon the relation between Clark and Freeman in respect to the transaction alleged as the occasion of the injury. If the excavation had been *ipso facto* unlawful, as an unnecessary encroachment on the street, Clark and Freeman would have been liable, if any liability existed, jointly as wrong doers. But if there was nothing in the work that Clark had required by the contract to be done which was in itself unlawful, or which, properly done, could be the occasion of an injury to any one, and Freeman, wholly free from the control of Clark as to the manner of doing the work, had by his own wrongful and negligent conduct been the cause of the injury, he alone would be liable. If, however, Freeman, acting under the control and direction of Clark as his servant or agent, had negligently and wrongfully allowed the excavation to be in an unfenced or otherwise dangerous condition, whereby the injury was sustained, Clark would be liable, although not jointly, with Freeman. In this last instance supposed either Clark or Freeman might be sued separately; but inasmuch as Clark, although he could not excuse himself on the ground that the nuisance had been occasioned by the negligence of Freeman, would have a right of action against Freeman for the recovery of such damages as he might be compelled to pay by reason of his negligence, he (Clark) could not be joined in the same action with Freeman. This doctrine was expressly ruled in *Parsons* v. *Winchell*, 5 Cush., 592, and it appears to rest upon a reason which is entirely satisfactory."

This case was followed by *Seelen* v. *Ryan*, 2 Cin. R., 158. From the Supreme Court of Maine we find the case of

Campbell v. *Sugar Co.*, 62 Me., 553.

Here the defendant corporation owned a wharf, and it and its general agents in charge of it were sued by Campbell for injuries received while rightfully using the wharf and because of failure to repair it. The Court said:

"The corporation is answerable for its constructive negligence, or, perhaps (to speak more exactly), on the principle of *respondeat superior*, and must be held, as Lord Kenyon remarked (1 East., 108), 'to make a compensation for the damage consequential from the employing of an unskillful or negligent servant.' The other defendants, who were the general agents of the corporation, and had the care of this wharf, and who, through their senior partner, had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal. It is the actual, personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation; and when their acts or neglects result in injury to third parties, they are equally responsible with their principals. But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons, assigned in *Parsons* v. *Winchell*, 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury. The proper adjustment of the final responsibility as between themselves can not well be affected if one who has distinct grounds of action against them—against the agents for their own negligence, and against the principal because the law makes them responsible for the negligence of their servants—is permitted to recover against both in one suit. The distinction between actions on the case arising from negligence and actions of trespass, where the wrong is inflicted at the command of the superior, in this respect, is well marked, and goes somewhat deeper than mere form."

In New Hampshire we find the case of

Page v. *Parker*, 40 N. H., 47.

Parker was sued in tort for fraudulent misrepresentations of his agents in a sale of property, he not being present and not knowing of the misrepresentations. The Court said:

"In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact or in legal intendment and effect. But the act of a servant or agent is not the act of the master or principal, even in legal intendment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it. *Parsons* v. *Winchell*, 5 Cush., 593. There is no contribution among joint wrongdoers, and if David M. Parker could be found guilty as a joint conspirator and defrauder with the other defendants, solely upon evidence of the unauthorized fraudulent acts and representations of his agent and the person employed by him to aid in effecting a sale, and he should be compelled to satisfy the judgment recovered against all, he would be entirely without remedy for reimbursement, or even contribution against the other defendants, however utterly unauthorized and disapproved those fraudulent acts and representations might have been. Unless, therefore, the plaintiff be able to show the joint participation of David M. Parker in the alleged fraudulent purpose and design of the other defendants, it would be manifestly unjust that he should be holden liable with them in the present action, even though he might be clearly liable, if sued separately, for the damage resulting from the unauthorized fraud of the agent employed by him to sell his property, since it is well settled that a principal has a remedy over for damages he may be compelled to pay in consequence of the unauthorized misfeasance and malfeasance of his agent."

We find the Kentucky Court of Appeals in line with the principles we have been discussing, in the case of

Perkins v. *Stein & Co.*, 94 Ky., 433.

Stein & Co. owned a brewery in Louisville and operated numerous wagons over the streets of Louisville, and whilst so engaged their agents and drivers carelessly ran over the plaintiff, Perkins. The plaintiff, Perkins, having died, his administratrix moved to revive the action, and it was argued

by the defendants (below) that the cause of action was assault and battery and under the statute could not be revived. Judge Hazelrigg (now Chief Justice), delivering the opinion of the Court, said:

"It is contended by the appellees that the negligent act of the servant or driver in running over the plaintiff was a trespass, and, therefore, an assault and battery in the meaning of the statute, and that for the injury growing directly out of this act, an action of trespass would lie at the common law, even against the master. Such an action, they contend, under the authority of *Anderson* v. *Arnold's Ex'cr*, 79 Ky., 370, dies with the person. We do not think, however, that the action is one of trespass. While the injury was the immediate consequence of the act, and in this particular the requirements of the rule in actions of this class is met, yet it was not the act of the master; the latter may be responsible in damages, indeed, ordinarily is, for the negligence of his servant, but case and not trespass is the proper remedy." (See page 435).

In the Federal Court there is an abundance of authority in support of our contention and none that we have been able to find to the contrary. We have seen the leading case is

Warax v. *C., N. O. & T. P. Ry. Co., supra.*

This was followed by

Hukill v. *Maysville & B. S. R. R. Co.*, 77 Fed. Rep., page 745.

Hukill, an employe of the Chesapeake & Ohio Railway Company, while at work upon one train, was struck by a board projecting from the roof of another train, and joined as defendants, the Chesapeake & Ohio Railroad Company for which he worked, and which was operating the road, the lessor company, Maysville & Big Sandy R. R. Co., and sundry employes, alleging that all the defendants were guilty of joint negligence. Judge Taft, also deciding this case, said:

"It is true the petition charges that all the defendants were guilty of joint negligence, and that all of them placed the car where it was in its defective condition; but, in the absence of a specific allegation that the defendant railway company was present, by some representative or superintending officer, we must assume that the company was only constructively present in the persons of its agents, the car inspectors and brakeman who are made co-defendants, and that its liability is not based on anything akin to the personal interference of a natural master. The case of *Campbell* v. *Sugar Co.*, 62 Me., 552, was a case in which the liability of the principal arose, as here, from a positive duty enjoined on him, and not simply from the public policy which makes the master liable for the negligence of his servant in and about his business; and yet it was there held that the master and servant were not properly joined unless actual concert of action, or something equivalent thereto, was shown. And a similar relation existed in the case cited by the Court in *Clark* v. *Fry*, 8 Ohio St., 358, 377, between the master and servant, with respect to the character of the act made the basis of that action.

This case is followed by

Hartshorn v. *A., T. & S. F. R. R. Co.*, 77 Fed. Rep., page 9.

Hartshorn was an employe of the defendant railroad company, and while engaged as brakeman was struck by a water spout projecting from a tank which had been constructed by a contractor for his use while working a steam shovel in doing certain work for the railroad company, and the petition alleges that the injury was the result of the negligence and carelessness of both defendants, and each of them, in constructing the water tank and spout and permitting the same to be so near to the main track and not warning plaintiff of the location thereof and danger. Philips, Judge, quoting *Warax* v. *Hukill*, *supra*, says:

"The form of action, therefore, on the part of plaintiff against the defendant railroad company, would at common law be an action on the case; while the liability of Brad-

bury to the plaintiff would spring from his willful act in constructing the dangerous obstacle so near to the railroad track as to endanger the lives and limbs of employes on the railroad performing a duty similar to that ascribed to plaintiff, and the form against him would be trespass *vi et armis*. In such contingency, according to the rule laid down in *Warax* v. *Railway Co.*, 72 Fed., 637, the action by the plaintiff against two such wrongdoers would not be joint, but several. On the other hand, giving to the averments of the petition their most favorable construction to the pleader, the liability of the defendant, Bradbury, for the injury in question rests upon his positive wrongful act in erecting a dangerous obstacle near to the railroad track, and the liability of the railroad company to the plaintiff as an employe in its service would spring from the obligation imposed upon the master to provide the servant with a reasonably safe place in which to perform his work. In this respect the facts of the case disclosed by the petition are not distinguishable in principle from those of *Hukill* v. *Railroad Co.*, 72 Fed., 745. The petition in that case was lodged against the Maysville & Big Sandy Railroad Company, the Chesapeake & Ohio Railway Company and five other persons who were in the employ of the Chesapeake, etc., Railway Company. The railroad belonged to the Maysville, etc., Railroad Company, which it had leased to the Chesapeake, etc., Railway Company, and the plaintiff's intestate was in the employ of the Chesapeake Railway Company as one of the crew connected with the switching of locomotives. While at work about a train of freight cars, Hukill was struck by a board projecting from the roof of another train of freight cars of said company and was killed. The petition alleged that the projecting board was on the roof of said car, and for a long time it constituted a defect endangering the bodies and lives of the employes of said railroad company, and that said car with said projection was placed by the defendants (meaning the said railroad company and the other defendants) where the said Hukill was struck by said board, and that the said defendants, with wanton negligence, permitted said defective car to remain where the same was, and wantonly and negligently failed to remedy said defect; that the other defendants, employes of the Chesapeake Railway Company, as car inspectors and repairers, inspected said car from which said board projected long before the decedent was knocked down

thereby, and had knowledge of this defect long prior to the injury and had ample time in which to remedy the same. The cause was removed from the state court into the Federal court of Kentucky on the petition of the Chesapeake Railway Company. It was again held, following the case of Warax, that the cause of action was separable, and therefore removable upon the petition of the Chesapeake Railway Company. The Court, composed of Judges Taft and Lurton, said:

"'The master's liability arises from his implied contractual obligation to his servant to furnish a reasonably safe place in which, and reasonably safe appliances with which to do his work. The liability of the servants charged as defendants in this case was to arise from their personal and affirmative acts directly causing the injury, as for trespass. No concert of action is alleged between the master and his servants in this case. On the contrary, the petition is full of allegations that, if the servants had done their duty to their master properly, no injury would have resulted to the plaintiff. It is true the petition charges that all of the defendants were guilty of joint negligence, and that all of them placed the car where it was in its defective condition; but, in the absence of a specific allegation that the defendant railroad company was present by some representative or superintending officer, we must assume that the company was only constructively present in the persons of its agents, the car inspectors and brakemen, who are made co-defendants, and that its liability is not based on anything akin to the personal interference of a natural master.'

"So, in the case at bar, in the physical causation there was no actual concurrence or concert of action among these defendants. By reason of the act of Bradbury in placing the water spout where he did, the injury came to plaintiff unaided, and in no degree promoted, by any movement or encouragement of the railway company. Therefore, there were no two forces put in motion, one by one defendant and the other by the other defendant, which co-acted in producing the given result. The misfeasance of Bradbury was the *vis major* which singly and alone wrought the mischief to the plaintiff and gave him an action in tort against Bradbury, independent of any contractual relation, while the railway company's liability is wholly constructive, dependent on a contract obligation which the law implies from the relation of master and servant. It seems to me, therefore,

illogical to say that this cause of action is not severable because of the concurring torts of two defendants, when the act of one was positive, a misfeasance, and the other was negative, a non-feasance; that is, it must depend upon a contractual relation between master and servant. And the right of severance ought the more especially to exist in a case like this, where the misfeasance of Bradbury was wholly independent of, and, as between him and the railway company, was not promoted by the company, and where the injury resulting from Bradbury's tort was complete without any act of the company other than of omission in failing to do something independent of Bradbury. It is to be conceded to the contention of the learned counsel for plaintiff that there is on this question of procedure a division of opinion among respectable courts; but, in my humble judgment, the conclusion reached by Judges Taft and Lurton rests upon the better reason, and, in the absence of a ruling more obligatory upon this court of trial, their judgment will be followed."

This case was followed January 17th, 1898, by the case of

Deere, Wells & Co. v. *C., M. & St. P. Ry. Co.*, 85 Fed., 876.

This was an action against the railway company and its section foreman for damages to plaintiff, occasioned by setting out a fire on the railroad right of way to clear it of dry grass, etc. Shiras, J., said:

"In further support of the right of removal, counsel for the railway company rely upon the proposition that 'a master is not jointly liable, and can not be jointly sued with his servant, for an injury caused by mere negligence of the latter in the master's absence,' and in support thereof cite a number of cases decided in the state courts, and also the cases of *Warax* v. *Railway Co.*, 72 Fed., 637; *Hukill* v. *Railroad Co.*, *Id.* 745, and *Hartshorn* v. *Railroad Co.*, 77 Fed., 9. In the leading case of *Warax* v. *Railway Co.*, in which this general question is very fully and ably discussed by Judge Taft, the plaintiff was a switchman in the employ of the railway company, who was injured, while engaged in coupling cars, through negligence in the movement of the train by the engineer thereof. Suit was brought against

the engineer and the railway company in a state court in Kentucky, and the railway company petitioned for removal of the case on the ground that the plaintiff was a citizen of Kentucky; that the railway company was an Ohio corporation; that the engineer, Snyder, was a citizen of Kentucky, but had been joined as a co-defendant for the sole purpose of defeating the right of removal to the Federal court. In the course of the opinion it is pointed out that the act of negligence in the movement of the train was an act of misfeasance on the part of the engineer, for which he was primarily and directly responsible to the plaintiff, whereas the railway company could only be charged with responsibility by showing that, as master, it could be held liable for the negligence of its servant, because the servant was engaged in and about the business of the master. Thus, the facts appearing on the face of the petition showed that the legal ground of liability upon which it was proposed to hold the defendants responsible was different as to each defendant, and upon this view of the case it could be said that there were involved therein severable controversies, because each was based upon different legal principles, and, if this were true, then the case could be removed on that ground. Clearly, under the statute, the Warax case could not be properly removed into the Federal court unless it involved a severable controversy. The court held that the engineer could not be regarded as a nominal or sham defendant, and expressly found that the facts averred in the petition showed a cause of action in favor of the plaintiff against the engineer for his personal misfeasance. This action, rightfully brought in the state court by the plaintiff against the engineer, was a suit between citizens of the same state, which could not be removed to the Federal court unless the case also involved another controversy, separate and distinct, existing between the plaintiff and the defendant railway company, citizens of different states. So far as the reasoning in that case is in support of the proposition that the facts in the petition contained showed that the plaintiff was relying on two grounds of legal liability, the one being the direct liability of the engineer for his personal misfeasance, and the other being the derivative liability of the master for the negligence of the servant, it seems to be well founded."

The Court, after discussing the question of misjoinder in the Warax case, continues:

"But whatever may be said of the real ground upon which the decision in the Warax case is founded, it is clear that the case, as appears by the facts alleged in the declaration therein, belongs to the class wherein the plaintiff seeks recovery against one defendant for his personal misfeasance, and against the other because this misfeasance was committed by one occupying the relation of servant to another, and the latter is sought to be held liable, not for any failure on his part to meet the requirements of the law, but on the ground that the master, though personally free from fault, must respond for the negligence of his servant, because the same happened in the business of the master." (Page 888).

The case at bar presents substantially the same state of pleading as the Warax case and the petition shows an attempt to recover against the master, not for its negligence, but that of its servants; the language is, "said negligence of the corporate defendant was done by and through its said servants."

The principle is also endorsed in the case of

Creagh v. *Equitable Life Insurance Co.*, 88 Fed., p. 1.

Hanford, Justice, in rendering the opinion, says he thinks the rule is sound, but misconceives the effect of the decisions of this Court in the case of *Powers* v. *Railway Co.*, 169 U. S., 92, and other cases by him cited. These cases do not decide that "an action against several defendants jointly, where by the plaintiff's own showing there is no joint liability, may not be split into several controversies, but must necessarily fail entirely."

It may be conceded that a defendant has no right to say an action shall be several which the plaintiff seeks to make joint, but if the plaintiff in his petition says his action is joint, but states facts showing he is trying to recover and must recover upon two distinct causes of action, then he is bound by his particular allegations and the general allegation that the negligence is joint must give way. Such an allegation is a mere conclusion of law and there can be but

one impression gathered from the petition, that is, that the servants are held for their direct tort and the master by reason of the negligence of the servants. (See Warax case, *supra*, page 641).

This Court's decision in the Powers case (169 U. S., 92) does not uphold the conclusion of Justice Hanford. On the contrary, the Powers case referring to Warax and Hukill, reserved the question. What is decided in *Pirie* v. *Tvedt*, 115 U. S., page 41, and the other cases cited by Justice Hanford, is, that the cause of action "is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings." But if the pleadings of the plaintiff show that he is declaring on two causes of action, which are separate and distinct, and the allegations of his petition make that perfectly plain, what he chooses to style it, as a conclusion of law, certainly will not control the positive averments of his petition, and the question is not what he calls it, but what the allegations of the petition declare it to be.

But the action against the master can not be a joint cause of action with that against the servant, because if the cause of action is joint the recovery, if against both, must be joint and the measure of damages must be the same.

This Court has decided that punitive damages can not be recovered against the master for the unauthorized and unratified acts of the servant.

Lake Shore, etc., Ry. Co. v. *Prentice*, 147 U. S., 101.

Mr. Justice Gray, in delivering the opinion, quotes from a former case as follows:

"If this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and

crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." (Page 108). See *The Amiable Nancy*, 3 Wheat., 546.

And again:

"But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: 'The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.' *Lothrop* v. *Adams*, 133 Mass., 471, 480, 481.

"Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate." (Page 110).

And again:

"This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in Quigley's case, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. (122 U. S., 610).

"The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in

doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. But the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce." (Page 114).

We think, upon principle and precedent, the case should have been removed by the state Court, and that the Court of Appeals of Kentucky were in error in not so deciding.

There is another ground upon which the Court of Appeals of Kentucky erred, and upon which this case should have been removed to the Federal court.

The plaintiff in error was entitled to a removal of this cause because of its allegation of unnecessary and fraudulent and unlawful joinder of the co-defendants Chalkey and Sidles, and was entitled to an opportunity to introduce proof in the Federal court upon the issue made in its petition for removal.

The petition for removal alleges as follows: "Your petitioner further states that the defendants, R. H. Chalkey and William Sidles, are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petition of this cause to the Circuit Court of the United States for the District of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States." (Record, page 4).

The plaintiff in error could not introduce in the state Court any proof as to these allegations of fraudulent joinder; that could only be done in the Federal court, and plaintiff was certainly entitled to an opportunity to intro-

duce proof along this line, and if it could have sustained by proof the allegations above recited, it was entitled to a removal of the cause on that ground alone.

Moreover, if the plaintiff may set up in his petition, by positive allegations, two causes of action which necessarily are separate and distinct, and by a simple additional allegation declare that the same are joint and thus defeat a removal of the action on the ground that there are two separate controversies, it would seem such a state of case in the petition itself would be a fraudulent joinder on the face of the papers; but if not, surely the defendant seeking to remove the case, should have an opportunity to introduce proof upon the question, and that, we have seen, it can only do in the Federal court.

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